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No. 80-1595

# In the Supreme Court of the United States

OCTOBER TERM, 1981

UNITED STATES OF AMERICA

*v.*

JOSEPH C. FRADY

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
*Solicitor General*
*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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# In the Supreme Court of the United States

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No. 80-1595

UNITED STATES OF AMERICA, PETITIONER

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## REPLY BRIEF FOR THE UNITED STATES

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1. Respondent's principal argument in support of the judgment of the court of appeals in this case is not that it accords with the policies underlying or the precedents interpreting the availability of collateral relief from a criminal conviction pursuant to 28 U.S.C. 2255. Instead, respondent contends (Br. 6-14) that because he was convicted of an offense under the District of Columbia Code, the district court and the court of appeals were in effect acting as local Article I courts; therefore, he argues, the decision to undertake review of his belated challenges to the jury instructions at his trial was nothing more than an application of idiosyncratic local rules, which may not, or at least should not, be reviewed by this Court. He further asserts that the District of Columbia Court of Appeals, now the highest court of the District on questions of local law, would have reached the same result as the court below had it had jurisdiction over his collateral attack proceeding, and that a holding by this

Court foreclosing consideration of his claims would unjustly discriminate against him as compared to persons committing local offenses subsequent to the court reorganization, in violation of equal protection principles. There are numerous, distinct errors in respondent's contention that render it untenable.

(a) Nowhere in the opinion of the court of appeals is there the slightest suggestion that it considered itself to be applying special local rules to a local case. Rather, the opinion clearly purports to be deciding a general issue of federal law in a manner that would equally govern collateral attacks under Section 2255 against convictions for violations of the United States Code. See, *e.g.*, *Oregon* v. *Hass*, 420 U.S. 714, 719-720 (1975). This approach is hardly surprising, since respondent was tried under the Federal Rules of Criminal Procedure and has invoked the general federal collateral attack statute, 28 U.S.C. 2255, as the jurisdictional basis for the challenge to his conviction. Thus, there is no basis for treating the decision in this case as though, contrary to the plain import of the court of appeals' ruling, it only involved a peculiarity of local law.

(b) Decisions of the District of Columbia Court of Appeals do not remotely support respondent's claim (Br. 8-9) that his challenges to the instructions at his trial would have been entertained by the local court system in a collateral attack proceeding. Certainly no case that respondent cites (and none of which we are aware) entails a holding or even an implication that unobjected to instructional errors or similar unpreserved claims of trial error would be entertained by the local courts if first raised on collateral attack. On the contrary, it appears that a defendant would not be permitted to maintain a collateral attack against a judgment of the Superior Court of the District of Columbia on such grounds in the face of procedural defaults such as occurred in the instant case.

Superior Court Criminal Rule 30 is identical to Fed. R. Crim. P. 30. See *Watts* v. *United States*, 362 A.2d 706, 708 n.3 (D.C. 1976) (en banc). Thus, even on direct appeal, the failure to make timely objection to erroneous jury instructions "insulates the disputed * * * [instruction] from appellate interference" (*id.* at 708), unless the District of Columbia Court of Appeals exercises its discretion to consider the instruction as plain error. *Id.* at 708-709 & n.3. Moreover, the District of Columbia Court of Appeals will consider errors not objected to at trial under the plain error doctrine only if the errors are "so clearly prejudicial to substantial rights as to jeopardize the very fairness and integrity of the trial" (*id.* at 709). See *Towles* v. *United States*, 428 A.2d 836, 842 (D.C. 1981); *Bundy* v. *United States*, 422 A.2d 765, 767-768 (D.C. 1980). In the District of Columbia Court of Appeals "reversals on appeal for errors not raised at trial * * * [are] the exception, and not the rule" (*Towles* v. *United States, supra*, 428 A.2d at 842).

In construing D.C. Code Ann. § 23-110 (1973), the District of Columbia Court of Appeals has made it quite plain that collateral attack is not considered the equivalent of direct appeal. See, *e.g.*, *Butler* v. *United States*, 388 A.2d 883 (D.C. 1978).[1] In *Hargett* v. *United States*, 380 A.2d 1005 (D.C. 1977), and *Atkinson* v. *United States*, 366 A.2d 450 (D.C. 1976), the court considered and rejected ineffective assistance of counsel claims. In both cases, however, the court emphasized the distinction between collateral attack and direct appeal. As explained in *Atkinson* (366 A.2d at 452), on collateral attack pursuant to Section 23-110, a prisoner is entitled to relief on the basis of an error that is

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[1]Indeed, in *Butler* the court followed *Hill* v. *United States*, 368 U.S. 424 (1962), and, contrary to respondent's assertion (Br. 8 n.8), declined to consider asserted violations of procedural rules identical to Fed. R. Crim. P. 32(a) and 43(a) on collateral attack.

neither constitutional nor jurisdictional *only* if it constitutes a serious defect not correctable on appeal or where " 'exceptional circumstances' " justify the failure to make an appropriate claim on direct appeal. Far from supporting respondent's assertion (Br. 8) that "under D.C. law failure to object to trial errors is not a waiver or forfeiture precluding either appellate or collateral review," the decisions of the District of Columbia Court of Appeals cited (see *ibid.*) strongly suggest the opposite conclusion.

(c) Even were there some basis for respondent's assertion that the District of Columbia courts would entertain a collateral attack such as he has brought, the application of general federal law to his case presents no equal protection problem. There is no similarly situated class of persons who would be treated differently from respondent. His access to collateral relief would be precisely the same as that of all persons who committed District of Columbia offenses and were tried in the federal district court under federal rules prior to the court reorganization—*i.e.*, in accordance with the principles governing collateral relief pursuant to 28 U.S.C. 2255. The fact that persons who committed offenses after the court reorganization would have been tried under local rules in the Superior Court and had access to collateral relief under the District of Columbia statute would do no more than create the possibility that differently situated persons might be treated differently. Equal protection principles impose no obligation to equalize the treatment of defendants tried in the federal courts of the District with that of defendants tried in the local courts. *Swain* v. *Pressley*, 430 U.S. 372, 379-380 n.12 (1977).

(d) Further, treating this case as though the trial had been in a state court, respondent invokes (Br. 13-14) the proposition that, in a collateral attack under 28 U.S.C. 2254, the cause and prejudice standard is inapplicable if, notwithstanding a procedural default, the state court considered the merits of the claim on direct appeal. See, *e.g.*,

*Francis* v. *Henderson*, 425 U.S. 536, 542 n.5 (1976). Respondent contends that the same principle governs in this case. However, the errors relied on in this collateral attack were not considered on the merits on direct appeal. Accordingly, the limitation on the application of the cause and prejudice standard noted in *Francis* v. *Henderson* is plainly inapposite.[2]

2. This Court has established "cause and prejudice" as the standard for determining when a procedural default can be excused on collateral attack in the federal courts. *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Francis* v. *Henderson*, 425 U.S. 536 (1976); *Davis* v. *United States*, 411 U.S. 233 (1973). Respondent attempts to distinguish *Davis* v. *United States, supra*, on the ground that Fed. R. Crim. P. 30 "is not an 'express waiver provision' " (Br. 13). According to respondent (*ibid.*), Rule 30 "merely changes the standard of review to plain error." The language of the provision speaks for itself: "No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection." Inclusion of the word "waiver" or "forfeiture" could not make the provision any clearer. Failure to make timely objection to jury instructions results in forfeiture of the right to obtain review of alleged instructional errors, even though an appellate court may, on direct appeal, exercise its discretion to consider the claim as "plain

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[2]If on direct appeal a court might have, but did not, consider certain errors pursuant to some doctrine akin to plain error, the cause and prejudice standard is nevertheless applicable in federal collateral proceedings. See *Taylor* v. *Harris*, 640 F. 2d 1, 2 n.3 (2d Cir. 1981). A federal habeas court does not sit as a surrogate for the state appellate court, reviewing the record for any error that could have been considered on direct appeal.

error."[3] We thus unavoidably return to the question whether the collateral attack court enjoys the same discretion to grant relief from "plain error" as does the direct review court. We have set forth in some detail (Gov't Br. 15-26) our reasons for contending that the scope of review is not this broad. Respondent has failed to answer those arguments.

3. Respondent concedes (Br. 10, 12) that the D.C. Circuit's decision in this case does not rest on constitutional grounds, but he nevertheless asserts (Br. 15-16), without fleshing out his contention, that the decisions in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975); and *In re Winship*, 397 U.S. 359 (1970), support the decision on the merits. Even assuming, however, that a properly preserved objection to the instructions would have justified a reversal on direct appeal on the authority of one or more of those cases,[4] respondent's argument simply misses the point of this case, which focuses on the failure to object to the defective instructions at trial or raise the issue on appeal. Accordingly, identifying a constitutional error in the instructions does not aid respondent, for absent a showing of both cause and prejudice, even constitutional claims may be barred by a procedural

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[3]As we have explained (Gov't Br. 24 n.19), considerations similar to those that support application of the cause and prejudice standard when a defendant has failed to comply with a contemporaneous objection rule suggest that failure to raise an issue on direct appeal should bar a claim on collateral attack absent a showing of cause and prejudice. Nevertheless, neither *Kaufman* v. *United States*, 394 U.S. 217 (1969), nor *Fay* v. *Noia*, 372 U.S. 391 (1963), needs to be further limited in this case since respondent also failed to make a contemporaneous objection to the instructions, as required by Fed. R. Crim. P. 30.

[4]We do not concede that *Mullaney* is applicable in this case (see Gov't Br. 42 n.35). *Winship* is obviously not implicated, since the trial court properly instructed the jury on the government's burden of proof.

default. See, *e.g.*, *Wainwright* v. *Sykes, supra; Francis* v. *Henderson, supra; Davis* v. *United States, supra.*[5]

4. Respondent apparently concedes (Br. 18) "[t]he irrelevance of the errors [in the instructions on malice] to the third man defense," but he contends that there was nevertheless actual prejudice justifying a new trial. According to respondent (Br. 16-18), prejudice is indicated by (1) the trial judge's decision to instruct the jury on the lesser included offense of manslaughter, (2) the fact that malice is an element of first degree murder, and (3) the doubts about the evidence of malice expressed by the court below.[6] This argument might have some force had respondent been convicted of second degree murder, but he was in fact convicted of premeditated and deliberate murder. He does not challenge the instructions concerning premeditation and deliberation. Neither the court of appeals nor respondent has suggested any plausible basis for believing that the jury that found the murder to have been premeditated and deliberate

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[5]We also note that it is far from clear that *Sandstrom* should be given retroactive effect. The courts of appeals are in conflict on this question. Compare *Burton* v. *Bergman*, 649 F. 2d 428, 431 n.3 (6th Cir. 1981), with *United States* v. *Spiegel*, 604 F. 2d 961, 969 n.15 (5th Cir. 1979), cert. denied, 446 U.S. 935 (1980). It is debatable whether the constitutional rule announced in *Sandstrom* remedied a defect that "substantially impair[ed]" the "truth-finding function" of the trial or that raised any "serious" questions about the accuracy of guilty verdicts, and retroactive application of the new rule may have a substantial impact on the administration of justice. Thus, it may be inappropriate to give it retroactive application. Compare *Hankerson* v. *North Carolina*, 432 U.S. 233, 243-244 (1977). This case does not in any event present the question.

[6]Respondent also asserts (Br. 18) that his conviction "must be set aside because the errors were of a kind affecting the jury deliberations on the basic question of guilt or innocence." To the extent that this is intended to suggest that on collateral attack an error in a jury instruction concerning an element of the offense is grounds for relief without regard to its likely impact on the jury or its significance at trial, respondent is wrong. *E.g.*, *Henderson* v. *Kibbe*, 431 U.S. 145, 154 (1977).

could nonetheless have concluded that it was not done with malice. Compare *United States* v. *Green*, 424 F. 2d 912, 913 (D.C. Cir. 1970), cert. denied, 400 U.S. 997 (1971); *Belton* v. *United States*, 382 F. 2d 150, 154-155 (D.C. Cir. 1967). Thus, whatever short cuts the defective malice instructions may have allowed the jury to take are immaterial, for the ground it traversed in finding premeditation and deliberation necessarily included the requirements omitted by the inadequate instructions.

## CONCLUSION

For the foregoing reasons and the reasons set forth in the government's opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
*Solicitor General*

NOVEMBER 1981

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